M WEALTH CORRIDOR SDN BHD v. BJ PROPERTIES SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
JOHAN LEE KIEN HOW JC
[CIVIL SUIT NO: WA-22NCVC-468-07-2019]
6 JUNE 2021

CIVIL PROCEDURE: *Interrogatories – Leave – Application for – Sale and purchase of land – Failure to pay balance purchase price within stipulated time – Forfeiture of deposit – Claim of conspiracy – Applicant sought leave to serve interrogatories to trace deposit – Whether application necessary – Whether will dispose of cause in fair manner – Whether costs and time saving – Whether questions posed would obtain admission that would reduce issues – Whether interrogatories related to matter – Whether court ought to exercise discretion to allow application – Rules of Court 2012, O. 26*

CIVIL PROCEDURE: *Discovery – Application for – Sale and purchase of land – Failure to pay balance purchase price within stipulated time – Forfeiture of deposit – Claim of conspiracy – Applicant sought discovery of documents – Whether documents sought relevant to suit – Whether items sought due to presumption – Rules of Court 2012, O. 24 rr. 3 & 7*

The plaintiff and the first defendant entered into a sale and purchase agreement ('SPA') for the purchase of land. The SPA provided that, *inter alia*, (i) the deposit, payable upon the execution of the SPA, would be forfeited if the plaintiff defaults in the payment of the balance purchase price. The deposit would only be returned if the first defendant defaults or if there were issues with the documents relating to the transfer of the land; and (ii) the balance purchase price was payable within 90 days from the date the SPA becomes unconditional, with an extension of 30 days. When the plaintiff failed to pay the balance purchase price within the extended completion date, the first defendant proceeded to terminate the SPA and forfeit the deposit. The plaintiff claimed that there was conspiracy by the defendants, namely (i) the first defendant; (ii) the second defendant, a person who was said to have authority and control over the first defendant; (iii) the third defendant, an established 'political and corporate personality' who was also a former board member and director of the plaintiff; and (iv) the fourth defendant, former legal counsel for the plaintiff. In these applications, the plaintiff sought (i) leave to serve interrogatories on the first defendant ('encl. 31'), pursuant to O. 26 of the Rules of Court 2012 ('ROC'), to identify the whereabouts of the deposit and, if the amount had been moved, at whose behest; and (ii) discovery of documents against the defendants ('encl. 32'), described in Schedule A of encl. 32 which comprised financial records and records of communications between the defendant(s), pursuant to O. 24 rr. 3 and 7 of the ROC. Resisting encl. 31, the first defendant argued that (i) the plaintiff did not meet the requirements of O. 26 of the ROC; and

(ii) encl. 31 was merely a fishing expedition that had nothing to do with the issues that had been pleaded and ought to be dismissed with costs. The first to fourth defendants shared similar, if not complementary, contentions in opposing encl. 32, namely that (i) the financial records were vague and unsubstantiated by any evidence to prove; and (ii) the documents sought by the plaintiff were wholly irrelevant to the suit and was a fishing expedition.

Held (dismissing applications):

(1) In considering whether to allow the interrogatories, the court must assess whether the questions posed would obtain an admission that would reduce issues and hence reduces the length of trial thus ultimately saving costs. For that reason, the interrogatories must be related to the cause or matter. However be it an exception, it must still satisfy the two-fold test. By a reading of O. 26 rr. 1(3) and (4) of the ROC, the exercise of the court's discretion to grant leave for interrogatories would only be positively affirmed if it is necessary and if it will dispose the cause in a fair manner or it saves costs. The documents sought after did not directly prove the existence of fact. Rather, it was only presumably a more tangible arrow to point the way. These kinds of answers did not assist the disposal of the matter or cause fairly or saves costs; on the contrary, it prolonged it. It was blatantly contrary to the purpose of interrogatories under O. 26 r. 1(3) and (4) of the ROC to dispose the matter or cause fairly or save costs. (paras 30, 50, 51 & 52)

(2) The interrogatories sought by the plaintiff were prolix, oppressive, unnecessary or scandalous as the plaintiff seemed to be interrogating the first defendant on its financial standing and as to how the deposit was used. The forfeiture was done in accordance with commercial practice. When a purchaser to a purported sale and purchase transaction could not proceed with the purchase, it is the vendor's right to forfeit the earners deposits. Upon such forfeiture, the money is the vendor's. He could deal and part with it as he wishes. This is the standard conveyancing practice in Malaysia and has duly been agreed to by the plaintiff and the first defendant in the SPA. (para 53)

(3) Enclosure 31 should not be allowed. It was clearly not an action for elicitation of evidence to support allegations of facts which had been raised with adequate particularisation. The interrogatories were in search of materials in the hope of being able to raise allegations of fact, namely the allegation of conspiracy. The answers would only provide further information and not evidence. (paras 38 & 56)

(4) Schedule A showed that the plaintiff was asking a wide range of items; many of which the plaintiff could not even specifically confirm the existence. It was also odd that the plaintiff tried to seek discovery against all four defendants in one application in one schedule. The items were related to the defendants separately and in different circumstances.

Hence, the discovery application should have been made against them individually in different grouping. The tactic of making a global application against all of them in one go was an inference of trawling or ransacking fishing expedition. Furthermore, it negated the fulfilment of key element of necessary. (para 73)

(5) The elements of discovery are: (i) the document must be identified; (ii) the document must not only be relevant but also necessary to the disposal of the matter fairly; and (iii) the document must be or have been in the possession, custody or power of the party against whom the order is sought. The discovery action in encl. 32 failed the three-fold test in many aspects. The generic nature, without specific in certainty, identifying the exact item and, in some cases, without detailing them with the name of the parties involved and the time and date have all tainted encl. 32. The discovery of the items was denied and dismissed. In most cases, the items sought were only due to the presumption of the plaintiff. Without clearly confirming that the items were in the possession, custody or control of the defendants, the discovery of those items would not, in any way, fulfil the purpose of fair disposal of the cause or saving costs. Instead, it would further prolong the matter unnecessarily. (paras 64, 104 & 105)

Case(s) referred to:

Kenwood Electronics (Malaysia) Sdn Bhd v. People's Audio Sdn Bhd & Ors [2003] 5 CLJ 436 HC ***(refd)***

Malaysia Debt Ventures Bhd v. Platinum Techsolve Sdn Bhd & Ors [2020] 1 LNS 1252 CA ***(refd)***

Nguang Chan aka Nugang Chan Liquor Trader & Ors v. Hai-O Enterprise Bhd & Ors [2009] 5 MLJ 40 ***(refd)***

Ong Commodities Pte Ltd v. Kek Tek Huat Sdn Bhd & Anor [2015] 10 CLJ 585 HC ***(refd)***

Overseas-Chinese Banking Corporation Ltd v. Norman Wright & Ors [1989] 1 LNS 53 HC ***(refd)***

Pangsapuri Anda Management & Ors v. Pembinaan Safilo Sdn Bhd [2021] 1 LNS 175 HC ***(refd)***

Re State of Norway's Application [1987] 1 QB 433 ***(refd)***

Sheikh Abdullah Sheikh Mohamed v. Kang Kock Seng [1974] 1 LNS 151 FC ***(refd)***

Yekambaran Marimuthu v. Malayawata Steel Bhd [1994] 2 CLJ 581 HC ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 126

Rules of Court 2012, O. 24 rr. 1, 3, 7, 8, O. 26 r. 1(3), (4)

Other source(s) referred to:

Halsbury's Laws of Malaysia, vol 7, 190.3-342

For the plaintiff - Conrad Young & PL Leong; M/s Sreenevasan Young

For the 1st & 2nd defendants - B Thangaraj & Nashilla; M/s Thangaraj & Assocs

For the 3rd defendant - T Sudhar & Tania Edward; M/s Steven Thiru & Sudhar Partnership

For the 4th defendant - Muhammad Shafiee Afendi; M/s K C Tang & Co

Reported by Najib Tamby

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JUDGMENT

(encls. No. 31 & 32)

Johan Lee Kien How JC:

Introduction

B **[1]** On or about 30 July 2015 a sale and purchase agreement ("SPA") was entered into between the plaintiff and the first defendant to purchase the property known as Pajakan Negeri PN 51541, Lot No. 11979, Mukim Ampang, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan ("Ampang land"). The purchase price was RM281,718,700 of which:

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(i) a deposit of RM28,171,870 ("deposit") was payable upon execution of the SPA; and

(ii) the balance RM253,546,830 ("balance purchase price") was payable within 90 days from the date the SPA becomes unconditional on 20 December 2015 ("completion date"), with an extension of 30 days subject to the payment of interest on 19 January 2016 ("extended completion date").

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The second defendant is said to be a person with authority and control over the first defendant. The third defendant is an established "political and corporate personality". He was also a former board member and director of the plaintiff. The fourth defendant is a principal from the legal firm Chan Tse Yuen & Co who was the former legal counsel for the plaintiff.

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[2] According to cl. 3.1 of the SPA, the deposit was to be paid to the first defendant after the SPA was executed. Clause 9.1 of the SPA states that the deposit will be forfeited in the event the plaintiff defaults in payment of the balance purchase price within the time specified. Clause 9.3 also stipulates that, the payment of the deposit should only be returned in circumstances where the first defendant has defaulted or if there are issues with the documents relating to the transfer of the Ampang land. Subsequently, the deposit was paid to the first defendant without any conditions. It is an undisputed fact that the plaintiff did not pay the balance purchase price within the extended completion date; due to the plaintiff's failure to pay the balance purchase price, the first defendant's solicitor issued a notice of termination dated 27 January 2016 to state that the SPA has been terminated on 19 January 2016 and the deposit has been forfeited. Despite the termination of the SPA, there were negotiations to enter into a new agreement and to extend time for the payment of the balance purchase price, but subject to the plaintiff showing proof of funds. The negotiations however failed.

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[3] There are two applications by the plaintiff before this court, namely the application in encl. 31 for leave to serve interrogatories on the first defendant ("interrogatories application") and the application in encl. 32 for discovery against the defendants ("discovery application"), both dated 10 November 2020. This judgment shall deal with them separately.

Interrogatories Application (Enclosure 31)

[4] The interrogatories application is to serve the interrogatories as listed in Schedule 1 therein on the first defendant and is made under O. 26 of the Rules of Court 2012.

[5] In encl. 31, the plaintiff is seeking for the first defendant's director to answer the following questions:

No.	Particulars
1.	Look at paragraph 15 of the Statement of Claim and paragraph 8 of the 1 st defendant's Defence in respect of the payment of 10% deposit of RM28,171,870.00 paid by the plaintiff to the first defendant pursuant to the Sale and Purchase Agreement dated 30.7.2015 ("SPA"). If this amount of RM28,171,870.00 was deposited in a bank account at the time it was paid by the plaintiff;
1.1.	Which bank?
1.2.	What is the bank account number?
1.3.	When was the Deposit effected?
1.4.	At whose instructions?
2.	If the answer to the 1st interrogatory is no:
2.1.	Where did the first defendant deposit the amount of RM28,171,870.00 paid by the plaintiff?
2.2.	When was the deposit effected?
2.3.	How was the deposit effected?
2.4.	At whose instructions?
3.	Is the full amount of RM28,171,870.00 still being held by the first defendant?
4.	If the answer to the third interrogatory is yes, where is this amount being held currently?
5.	If the answer to the third interrogatory is no:
5.1.	How much of RM28,171,870.00 is still being held by the first defendant?
5.2.	How much of the RM28,171,870.00 was transferred out, to whom, how and when did the transfer or transfers take place?

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5.3. At whose instructions was the whole or part of the RM28,171,870.00 transferred out from the first defendant's possession?

5.4 Where did the first defendant deposit the amount of RM28,171,870.00

B **[6]** The plaintiff submitted that a plain reading of the interrogatories in Schedule 1 makes it clear that the interrogatories are both relevant and necessary.

[7] Since the application under encl. 31 is to serve interrogatories on the first defendant, only first defendant replied to the application and to the C submission by the plaintiff.

[8] The first defendant began its submission stressing that the burden is on the plaintiff to prove conspiracy, trust and procuring breach of contract which are totally alien to the issue.

D **[9]** The first defendant contended that what is obvious from the interrogatories sought by the plaintiff is that it does not at all relate to the pleaded case of the plaintiff against the first defendant, or the defence filed by the first defendant.

E **[10]** Also, it cannot be considered as necessary either for disposing fairly of the cause or matter or for saving costs. It relates to matters which are completely not relevant, and it is merely a fishing expedition on the part of the plaintiff.

[11] The interrogatories sought by the plaintiff even before the discovery F application or exchange of witness statements and which are not relevant to the pleaded case ought not to be allowed. Further, if these evidence could be obtained from the evidence of witnesses, then interrogatories on these issues should not be allowed.

[12] The first defendant also pleaded that the interrogatories sought by the G plaintiff are also prolix, oppressive, unnecessary, or scandalous as the plaintiff seems to be interrogating the first defendant on its financial standing and as to how the deposit was used.

[13] In brief, the first defendant opposed the plaintiff's application under encl. 31 and reasoned that the plaintiff did not meet the requirements of H O. 26 of the Rules of Court 2012. The first defendant stressed that encl. 31 is merely a fishing expedition that has nothing to do with the issues that has been pleaded and ought to be dismissed with costs. Therefore, the first defendant objected to encl. 31 because the interrogatories sought have nothing to do with the plaintiff's pleaded case, the interrogatories are I oppressive, and they are just fishing expedition of the plaintiff.

[14] The plaintiff rebutted these lines of arguments by the first defendant and highlighted that the plaintiff's case is not, as the first defendant submitted about the right of the first defendant to forfeit the sum of RM28,171,870 or that the plaintiff was in no position to pay the balance purchase price. Rather, it was about whether that forfeiture was the result of a conspiracy between the defendants in order for the defendants to keep that RM28,171,870 for themselves.

Discovery Application (Enclosure 32)

[15] The plaintiff's discovery application is for the discovery of documents described in Schedule "A" of encl. 32 against all four defendants. The application is made under O. 24 rr. 3 and 7 of the Rules of Court 2012.

[16] There are two categories of documents being sought in the discovery application, namely financial records, which are items 1 to 4 of Schedule "A", and the record of communications between the defendant(s), both amongst themselves and between the defendant(s) and their agents/nominees/employees and third parties, which are items 5 to 12 of Schedule "A" documents ("the Schedule A").

[17] On 15 October 2020, the third defendant received a letter from the plaintiff's solicitor requesting for documents which was *pari materia* to Schedule A of their notice of application which will be referred to later.

[18] On 4 November 2020, the third defendant responded to the plaintiff's solicitor *vide* their letter dated the same that the plaintiff's request for discovery tantamount to a fishing expedition.

[19] The plaintiff then filed a notice of application on 10 November 2020 for an order of discovery against the defendants under O. 24 rr. 3 and 7 of the Rules of Court 2012 to, *inter alia*, produce and serve on the plaintiff documents in their possession, custody or power of the defendants as in Schedule A of the notice.

[20] Schedule A is reproduced as below:

No.	Particulars
1.	The first defendant's Report and Financial Statements for the Financial Year ended 31.12.2015, 31.12.2016, 31.12.2017, and 31.12.2018.
2.	The first defendant's financial records showing the receipt of the sum of RM28,171,870.00 from the plaintiff and its disposal thereof including but not limited to bank statements.
3.	The second defendant's financial records showing the receipt of all or part of the sum of RM28,171,870.00 from the plaintiff and its disposal thereof including but not limited to bank statements.

4. The third defendant's financial records showing the receipt of all or part of the sum of RM28,171,870.00 from the plaintiff and its disposal thereof including but not limited to bank statements.

5. The fourth defendant's financial records showing the receipt of all or part of the sum of RM28,171,870.00 from the plaintiff and its disposal thereof including but not limited to bank statements.

6. The telephone records showing telephone calls to/from/between the defendants and/or their employees/agents/nominees including Nicholas Chang, Felicia Ng, Frankie Ong, May Siew whether individually or between more of one of them between 14.12.2015 and 27.2.2016.

7. All documents leading to and concerned with the issuance of Chew Biman & Co's letter dated 18.4.2016 to Amir, Lim & Partners including but not limited to:

7.1 correspondence;

7.2 memoranda;

7.3 emails and/or other forms of electronic communication including but not limited to Short Messaging Text (SMS), WhatsApp and WeChat to/from/between:

(a) the first defendant's agents and/or employees whether individually or between more of one of them;

(b) the second defendant and/or his agents and/or employees whether individually or between more of one of them;

(c) the third defendant and/or his agents and/or employees whether individually or between more of one of them;

(d) the fourth defendant and/or his agents and/or employees whether individually or between more of one of them;

(e) the defendants and/or their employees/agents/nominees including Nicholas Chang, Felicia Ng, Frankie Ong, May Siew whether individually or between more of one of them in respect of the said letter.

8. All documents leading to and concerned with the issuance of the letter dated 24.10.2015 by the third defendant on the plaintiff's letterhead to the first defendant including but not limited to:

8.1 correspondence;

8.2 memoranda;

8.3 emails and/or other forms of electronic communication including but not limited to Short Messaging Text (SMS), WhatsApp and WeChat to/from/between:

(a) the first defendant's agents and/or employees whether individually or between more of one of them;

(b) the second defendant and/or his agents and/or employees whether individually or between more of one of them;

(c) the third defendant and/or his agents and/or employees whether individually or between more of one of them;

(d) the fourth defendant and/or his agents and/or employees whether individually or between more of one of them;

(e) the defendants and/or their employees/agents/nominees including Nicholas Chang, Felicia Ng, Frankie Ong, May Siew whether individually or between more of one of them in respect of the said letter.

9. All documents leading to and concerned with the issuance of the letter dated 27.10.2015 by the third defendant on the plaintiff's letterhead to the first defendant including but not limited to:

9.1 correspondence;

9.2 memoranda;

9.3 emails and/or other forms of electronic communication including but not limited to Short Messaging Text (SMS), WhatsApp and WeChat to/from/between:

(a) the first defendant's agents and/or employees whether individually or between more of one of them;

(b) the second defendant and/or his agents and/or employees whether individually or between more of one of them;

(c) the third defendant and/or his agents and/or employees whether individually or between more of one of them;

(d) the fourth defendant and/or his agents and/or employees whether individually or between more of one of them;

(e) the defendants and/or their employees/agents/nominees including Nicholas Chang, Felicia Ng, Frankie Ong, May Siew whether individually or between more of one of them in respect of the said letter.

10. All documents leading to and concerned with the issuance of the e-mail dated 17.12.2015 from Felicia Ng to May Siew including but not limited to:

10.1 correspondence;

10.2 memoranda;

10.3 emails and/or other forms of electronic communication including but not limited to Short Messaging Text (SMS), WhatsApp and WeChat to/from/between:

(a) the first defendant's agents and/or employees whether individually or between more of one of them;

(b) the second defendant and/or his agents and/or employees whether individually or between more of one of them;

(c) the third defendant and/or his agents and/or employees whether individually or between more of one of them;

(d) the fourth defendant and/or his agents and/or employees whether individually or between more of one of them;

(e) the defendants and/or their employees/agents/nominees including Nicholas Chang, Felicia Ng, Frankie Ong, May Siew whether individually or between more of one of them in respect of the said e-mail.

11. All documents leading to and concerned with the issuance of the e-mail dated 5.1.2016 from Nicholas Chang to the fourth defendant including but not limited to:

11.1 correspondence;

11.2 memoranda;

11.3 emails and/or other forms of electronic communication including but not limited to Short Messaging Text (SMS), WhatsApp and WeChat to/from/between:

(f) the first defendant's agents and/or employees whether individually or between more of one of them;

(g) the second defendant and/or his agents and/or employees whether individually or between more of one of them;

(h) the third defendant and/or his agents and/or employees whether individually or between more of one of them;

(i) the fourth defendant and/or his agents and/or employees whether individually or between more of one of them;

(j) the defendants and/or their employees/agents/nominees including Nicholas Chang, Felicia Ng, Frankie Ong, May Siew whether individually or between more of one of them in respect of the said e-mail.

12. All documents issued between 14.12.2015 and 27.2.2016 including but not limited to:

12.1 correspondence;

12.2 memoranda;

12.3 emails and/or other forms of electronic communication including but not limited to Short Messaging Text (SMS), WhatsApp and WeChat to/from/between:

(a) the first defendant's agents and/or employees whether individually or between more of one of them;

(b) the second defendant and/or his agents and/or employees whether individually or between more of one of them;

(c) the third defendant and/or his agents and/or employees whether individually or between more of one of them;

(d) the fourth defendant and/or his agents and/or employees whether individually or between more of one of them;

(e) the defendants and/or their employees/agents/nominees including Nicholas Chang, Felicia Ng, Frankie Ong, May Siew whether individually or between more of one of them.

[21] The main contention of the first and second defendants on the financial records, in items 1 to 5 of Schedule A, were that the plaintiff was on a fishing expedition. The financial records were vague and ambiguous at best and unsubstantiated by any evidence to prove the allegations.

[22] On the telephone records in item 6 of Schedule A, the first and second defendants contended that the first defendant is a company. Therefore, as an artificial entity, it would have had no records of conversation with employees/agent/nominees. Moreover, the first and second defendants do not have any telephone records at all. Otherwise, the persons named ie, Nicholas Chang, Felicia Ng, Frankie Ong, and May Siew either communicate by telephone daily, or their communications are privileged between them, or they are non-parties. Thus, the request is irrelevant.

[23] On the documents under items 10 to 12, the first and second defendants adamantly pursued their line of argument that either the documents were wholly irrelevant to the suit or that it is a clear showing of a fishing expedition; the documents were not specific, and the documents are not certain by whom it was made or whether it existed at all.

[24] Briefly, the third defendant's submissions were similar to the first and second defendants' where they contended that the documents in Schedule A did not satisfy the threefold requirements for discovery and that it was a fishing expedition. Also, the third defendant denied having some of the item listed under Schedule A.

[25] The fourth defendant's submission was complementary to the first and second defendants'. They argued that, similarly to the first and second defendants, that the case as pleaded by the plaintiff is in essence a refund of the forfeited deposit. However, none of the alleged records sought by the plaintiff forms part of the pleaded case.

Findings And Decision Of The Court

[26] After appraising the facts adduced by both the parties through affidavits and the exhibits, and after considering the submissions by the learned counsels for both sides, I find that the plaintiff has failed to convince the court for both encl. 31 and encl. 32. My decisions are based on the following findings.

Enclosure 31

[27] This judgment deals with two applications namely encl. 31 for interrogatories, and encl. 32 for discoveries. I will deal with both separately in their own issues and together wherever common issues arise.

[28] For interrogatories, the relevant law is prescribed in O. 26 r. 1 of the Rules of Court 2012:

(1) A party to any cause or matter may apply in Form 44 to the court for an order:

(a) giving him leave to serve on any other party interrogatories relating to any matter in question between the applicant and that other party in the cause or matter; and

(b) requiring that other party to answer the interrogatories on affidavit within a specific period of time which shall not be less than fourteen days from the date of service of the interrogatories.

...

(3) On the hearing of an application under this rule, the court shall give leave as to such only of the interrogatories as it considers necessary either for disposing fairly of the cause or matter or for saving costs; and in deciding whether to give leave, the court shall take into account any offer made by the party to be interrogated to give particulars or to make admissions or to produce documents relating to any matter in question

(4) A proposed interrogatory which does not relate to such a matter as is mentioned in para. (1) shall be disallowed notwithstanding that it might be admissible in oral cross-examination of a witness.

[29] At the outset, rr. 1(3) and (4) has provided the criteria this court needs to take account before deciding on allowing or refusing this application:

(i) when it is considered necessary; and

(ii) when it disposes the cause or matter fairly or for saving costs.

[30] Hence, by a reading of O. 26 rr. 1(3) and (4), the exercise of this court's discretion to grant leave for interrogatories will only be positively affirmed if first, it is necessary; second, it will dispose the cause in a fair manner or it saves costs.

[31] The earliest description of the criteria to be met in allowing interrogatories in the appellate courts was found in the Federal Court case of *Sheikh Abdullah Sheikh Mohamed v. Kang Kock Seng* [1974] 1 LNS 151; [1975] 1 MLJ 89 at p. 90 where Gill CJ held that

> In considering whether the interrogatories should be allowed or not the court must consider whether they are **designed to obtain admissions of facts which will reduce the issues, shorten the length of the trial and thus save costs**. In our judgment the interrogatories in this case satisfied all those tests.
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> (emphasis added)

[32] In a later case, the objective of interrogatories was clearly explained by Chao Hick Tin JC in *Overseas-Chinese Banking Corporation Ltd v. Norman Wright & Ors* [1989] 1 LNS 53; [1989] 3 MLJ 73 at pp. 75 and 76:

> The first question for my consideration is whether the first and third defendants should be given leave to serve the interrogatories on the plaintiffs. Generally, interrogatories are admissible if they come to support

A the applicant's case or to impeach or destroy the opponent's case. *The object of interrogatories is to 'see whether the party who interrogates cannot obtain an admission from his opponent which will make the burden of proof easier than it otherwise would have been'*: see Cotton LJ in *AG v. Gaskill* (1881-2) 20 Ch D 519 at p 528. Obviously, each case has to be decided in the light of the facts set out and/or issues raised in the pleadings. In any event, B *interrogatories will only be allowed as shall be considered necessary either for disposing fairly of the cause or matter, or for saving costs*. If the admission of a fact can be proved by a witness who will be called at the trial, interrogatories will not, as a rule, be allowed because it will not save but add to costs. (emphasis added)

C **[33]** The authorities thus present a "two-fold test" where the interrogatories applied must be both relevant and necessary where it will dispose the cause or matter fairly or saves costs.

[34] To disallow an application for interrogatories, there are several grounds upon which a resisting party can stand on. Most commonly, a D resisting party can argue that the exercise is a fishing expedition, characteristically where a party presents an ambiguous or vague description of documents.

[35] The description of "fishing" is provided by Kerr LJ in *Re State of* E *Norway's Application* [1987] 1 QB 433 at p. 482; [1989] 1 All ER 661 at p. 684:

> ... although 'fishing' has become a term of art for the purposes of many of our procedural rules dealing with applications for particulars of pleadings, interrogatories and discovery, illustrations of the concept are more easily recognised than defined. *It arises in cases where what is sought* F *is not evidence as such, but information which may lead to a line of inquiry which would disclose evidence. It is the search for material in the hope of being able to raise allegations of fact, as opposed to the elicitation of evidence* to support allegations of fact which have been raised *bona fide* with adequate particularisation.
>
> (emphasis added)

G **[36]** In *Sheikh Abdullah* (*supra*) at p. 90, the Federal Court explicitly described the form of a fishing interrogatory:

> Only such interrogatories as are designed to prove a cause of action or defence not as yet pleaded, or to establish a cause of action against a third person, can be rightly called "fishing interrogatories". **In other words, they** H **are interrogatories which do not relate to any matter in question in the cause or matter**. As regards questions the answers to which may incriminate the party concerned, the rule is to allow all such questions as are material to be put and let any objection to answer them be taken on oath by the interrogated party at the stage of answering them.
>
> I (emphasis added)

[37] Therefore, through the descriptions in *Re State of Norway's Application* (*supra*) and *Sheikh Abdullah* (*supra*), for an interrogatory to be considered as a fishing expedition, the answers to the line of inquiry will have these two faces:

(i) where the answer only provides further information and not evidence; or

(ii) where the answer does not relate to a matter or cause.

[38] In applying the law to our present application in encl. 31, it is my finding that the application should not be allowed. I shall discuss the relevant submission of the parties concerning key consideration for this court and explain my decision thereafter.

[39] The plaintiff submitted that the proposed interrogatories have a clear and common purpose – to identify the whereabouts of the RM28,171,870, and if the amount has indeed been moved, at whose behest.

[40] Part of the first defendant's pleaded defence to the plaintiff's claim of conspiracy is that the amount was lawfully forfeited by the first defendant for breach of the SPA, and conversely, the plaintiff's case is that the defendants have conspired to keep the amounts for themselves. As such, the plaintiff pleaded that the whereabouts of the amount is "directly in issue" because if the amount has indeed been transferred to the other defendants, it would adversely affect the defendants' collective defences.

[41] Also, to the plaintiff, the answers to the interrogatories posed in Schedule 1 are matters that are "directly in issue" as they relate to the pleading in para. 31 of the statement of claim. Allowing the plaintiff the opportunity to obtain the answers at this stage will therefore means that, the areas covered by the proposed interrogatories will not be in dispute come the trial, and there will be no need for any further lengthy examination of this issue in court.

[42] Thus, the plaintiff submits that the interrogatories application clearly also passes the requirement of necessity.

[43] The plaintiff is basically seeking interrogatories on the status of the deposit sum of RM28,171,870 ("deposit") which has been forfeited pursuant to the express terms of the sale and purchase agreement dated 30 July 2015 ("SPA") as the plaintiff had failed to pay the balance purchase price within the time period stipulated in the SPA. The first defendant reasoned that this is not a case that the first defendant has siphoned out the monies and is not able to refund the deposit which has been paid. The first defendant being the registered owner of the Ampang land which is worth RM281,171,870 has the absolute right to sell the Ampang land and to forfeit any deposit paid for it when an intended purchaser failed to complete the sale and purchase transaction.

[44] To the first defendant, the plaintiff's leave application for interrogatories in respect of the payment of the deposit is not relevant to the pleaded case because the present suit against the first defendant is based on the fact that there is a varied SPA and an extension of time was allegedly given to the plaintiff to make payment of the balance purchase price. Other issues pleaded by the plaintiff such as conspiracy, holding as constructive trustee and procuring a breach of the contract are all red herrings to deliberately camouflage the real issue: that the plaintiff is not in a position to pay the balance purchase price. The first defendant further premised that till to date the plaintiff has failed to show any proof of its source of funds to pay the balance purchase price. They also alleged that there is sufficient evidence before the court to show that the plaintiff is having problems to make the payment of the balance purchase price and this can be seen from the plaintiff's solicitor's letter dated 13 January 2016 (encl. 35 – exh. "LSP-1") and an email dated 26 February 2016 (encl. 35 - exh. "LSP-11") from the plaintiff's representative requesting extension of time to pay the balance purchase price.

[45] Thus, the interrogatories requested by the plaintiff with regard to the whereabouts of the deposit and documents to show the monetary trails of the deposit are not relevant or necessary to the pleaded case in the present proceedings.

[46] Since there is nothing in the SPA stating that the deposit was not held in trust for the plaintiff, the first defendant has the absolute right to deal with the forfeited deposit. The first defendant further alleged that from the interrogatories sought by the plaintiff, it is obvious that the plaintiff has deviated from the crux of this case which is a clear-cut case of the SPA being terminated due to the plaintiff's failure to pay the balance purchase price. They further submitted that there are no facts that has been pleaded and neither are there any evidence that the issue of alleged conspiracy has caused the failure on the part of the plaintiff to pay the balance purchase price.

[47] Despite the termination of the SPA, there were negotiations to enter into a new agreement and to extend time for the payment of the balance purchase price, but subject to the plaintiff showing proof of funds. It is the first defendant' case that the plaintiff had failed to do. (Paragraph 12(c) to (e) of the first defendant's statement of defence).

[48] The first defendant then concluded that the interrogatories requested by the plaintiff which are not based on the pleaded case of the plaintiff or the defence by the first defendant cannot be considered as necessary either for disposing fairly of the cause or matter or for saving costs. It relates to matters which are completely not relevant, and it is merely a fishing expedition on the part of the plaintiff.

[49] The plaintiff's submission was not much of assistance to show in what manner the two-fold test mentioned earlier would be satisfied. Their submission suggests as if the "relevance" requirement under the discovery is applicable to an interrogatories application. It is not. This court finds support in *Halsbury's Laws of Malaysia* – vol. 7 at 190.3-342:

> Interrogatories should be distinguished from the discovery of documents, from particulars of pleadings, both of which are designed to ascertain or narrow the issues in the action, and from the voluntary admission of facts.

[50] In considering whether to allow the interrogatories, this court must assess whether the questions will obtain an admission that reduces issues and hence reduces the length of trial, thus ultimately save costs. For that reason, the interrogatories must be related to the cause or matter. However, be it an exception, it must still satisfy the two-fold test of being necessary and fair disposal of the matter or cause.

[51] In *Sheikh Abdullah* case (*supra*), the court allowed the interrogatories on the basis that it was an exception to the general rule that interrogatories must be confined to matters in issue: under some circumstances, it may extend to existence or non-existence of facts directly related in issue. However, this is contrary to the case before this court; the documents sought after in this discovery action do not directly prove the existence of fact. Rather, it is only presumably a more tangible arrow to point the way.

[52] These kinds of answers do not assist the disposal of the matter or cause fairly or saves costs, but on the contrary, prolongs it. Therefore, it blatantly goes contrary to the purpose of interrogatories under O. 26 r. 1(3) and (4) to dispose the matter or cause fairly or save costs.

[53] I agree too with the first defendant that the interrogatories sought by the plaintiff are also prolix, oppressive, unnecessary or scandalous as the plaintiff seems to be interrogating the first defendant on its financial standing and as to how the deposit was used. We have to bear in mind that the forfeiture was done in accordance with a commercial practice. When a purchaser to a purported sale and purchase transaction could not proceed with the purchase, it is the vendor's right to forfeit the earnest deposits. Upon such forfeiture, the money is the vendor's. He could deal and part with it as he wishes. This is the standard conveyancing practice in Malaysia and has duly been agreed by the plaintiff and the first defendant in the SPA.

[54] The plaintiff had tried to justify the need for these answers by saying that they are crucial to show that forfeiture was the result of a conspiracy between the defendants in order for the defendants to keep that RM28,171,870 for themselves. The plaintiff then cited numerous meetings and correspondences as to support their case that the allegation of conspiracy is not without any basis.

[55] While those allegations are to be proven when the case proceeds with trial, the interrogatories in Schedule 1 would not in any way reduce the length of the trial or necessary or leading to fair disposal of the matter or cause. Rather, as mentioned earlier, the answers to those interrogatories will prolong the trial and further complicate the trial with unwanted issues and disputes.

[56] The court is conscious that interrogatories will only be allowed as shall be considered necessary either for disposing fairly of the cause or matter, or for saving costs. What is sought here is not evidenced as such, but information which may lead to a line of inquiry which would disclose evidence. Enclosure 31 is clearly not an action for the elicitation of evidence to support allegations of fact which have been raised with adequate particularisation. The interrogatories in Schedule 1 are in search of material in the hope of being able to raise allegations of fact, namely, the allegation of conspiracy in our present case. The answers would only provide further information and not evidence.

[57] Also, the court is mindful of the *ratio* in *Overseas-Chinese Banking's* case (*supra*) that if the admission of a fact can be proved by a witness who will be called at the trial, interrogatories will not, as a rule, be allowed because it will not save but add to costs. Therefore, encl. 31 is futile.

Enclosure 32

[58] On the law on discovery applications, O. 24 rr. 1 and 7 of the Rules of Court 2012 provide the power of this court to grant the application:

> 1. (3) Subject to the provisions of this rule and of rr. 4 and 8, the court may at any time order any party to a cause or matter (whether begun by writ, originating summons or otherwise) to give discovery by making and serving on any other party a list of the documents which are or have been in his possession, custody or power and may at the same time or subsequently also order him to make and file an affidavit verifying such a list and to serve a copy thereof on the other party ...
>
> 7. (1) Subject to r. 8, the court may at any time, on the application of any party to a cause or matter, make an order requiring any other party to make an affidavit stating whether any document specified or described in the application or any class of document so specified or described is, or has at any time been, in his possession, custody or power, and if not then in his possession, custody or power when he parted with it and what has become of it.

[59] Order 24 r. 8 of the Rules of Court 2012 then outlines the criteria to allow this application:

> On the hearing of an application for an order under rr. 3, 7 or 7A, the court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or adjourn the application and

shall in any case refuse to make such an order if and so far as it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs.

[60] The *locus classicus* on elements of discovery is the case *Yekambaran Marimuthu v. Malayawata Steel Bhd* [1994] 2 CLJ 581 at p. 585:

The essential elements for an order for discovery are threefold; namely, first there must be a "document", secondly, the document must be "relevant" and thirdly, the document must be or have been in the "possession, custody or power" of the party against whom the order for discovery is sought.

[61] This court takes cognisance that a recent decision in the Court of Appeal was decided in *Malaysia Debt Ventures Bhd v. Platinum Techsolve Sdn Bhd & Ors* [2020] 1 LNS 1252; [2020] MLJU 1421 which has the effect of tightening the requirements in *Yekambaran* (*supra*) above:

[198] ... Relevance cannot be conflated with necessary, as what is relevant may not be necessary.

[199] In our view, the question as to whether the document for which disclosure is sought is necessary is an important and we might, add pivotal component for the order of discovery under O. 24 r. 7 ROC. Indeed, O. 24 r. 8 ROC also makes it imperative that the court to refuse discovery if it is satisfied that discovery was not necessary.

[62] The Court of Appeal then emphasised that the documents sought after in the discovery must be specific, where the contents must relate directly to the cause or matter in issue which will fulfil the purposes of discovery of fair disposal of the cause or saving costs.

[206] We are fortified in our view that it matters not one jot what the DSA says as regards the terms of the purported settlement. The respondents are of course entitled to contend at the trial that the existence of the DSA supports their theory that there was a concluded contract of settlement. Beyond that, the respondents have to stand or fall on the several correspondence and discussion as pleaded in the Defence and Counterclaim. ...

[209] On that premise and analysis, it becomes quite clear that the DSA is neither relevant nor necessary for the fair disposal of the trial. And most certainly, discovery of the DSA will not lead to savings of cost. Rather, it is more likely that costs will escalate as discovery of the DSA could well lead to further applications including but not limited to an application to amend the Defence and Counterclaim.

[63] It bears in mind to repeat this part of the *Malaysia Debt Ventures* (*supra*) judgment. For a discovery application to succeed, the applicant is required to show how it would lead to fair disposal of the trial or savings of cost.

[64] The effect of *Malaysia Debt Ventures* (*supra*) is the element of "necessary" to the second limb of the three-fold test. I agree with the illustration provided by the third defendant as to the differences between the two judgments. Considering this, it appears to us that the updated elements of discovery are as follows:

(i) The document must be identified.

(ii) The document must not only be relevant but also necessary to the disposal of the matter fairly.

(iii) The document must be or have been in the possession, custody, or power of the party against whom the order is sought.

[65] The crucial factor for consideration in an application for discovery is relevancy, and now coupled with necessity. I iterate the judgment in *Malaysia Debt Ventures* (*supra*) on this element:

> [202] In our view, the proper approach to the question of whether discovery is "necessary" may be gleaned from the case of *Bayerische Hypo- und Vereinsbank AG v. Asia Pacific Breweries (Singapore) Pte Ltd And Other Applications* [2004] SGHC 155; [2004] 4 SLR (R) 39 ("*Bayerische*") where the High Court of Singapore at paragraph [37] stated as follows:
>
> > The ultimate test is whether discovery is necessary for disposing fairly of the proceedings or for saving costs. An assertion that the documents are relevant will not be good enough. Equally, an assertion that the documents are necessary because they are relevant will not be enough.
>
> [203] Further, in paragraph [38] of the judgment, the Singapore High Court had considered O. 24 r. 7 which is *pari materia* with our O. 24 r. 8 and stated that:
>
> > The court is, by O. 24 r. 7, concerned with the discretion to refuse disclosure of a document unless the necessity for disclosure is clearly demonstrated.
>
> [204] As stated earlier, the burden was on the respondents to establish to the satisfaction of the court that the DSA is not just relevant but also that it is necessary for disposing the matter fairly and for savings of cost as well.

[66] The approach in *Malaysia Debt Ventures* (*supra*) is now this court must assess whether the documents sought in the discovery application is necessary where obtaining those documents will undoubtedly improve the quality of the manner the matter is disposed. Assertion to relevance is no longer enough.

[67] Another ground is when the document is not in possession, custody, or power against whom the order sought. This court refers to the case of *Nguang Chan Nguang Chan Liquor Trader & Ors v. Hai-O Enterprise Bhd & Ors* [2009] 5 MLJ 40 at pp. 48 and 49, where the Court of Appeal decided on fulfilment of element of possession, custody or power:

> And even in the case of a pleading or affidavit the reference to any document therein must be by way of direct allusion to a document or class of documents sought for discovery and not if the reference arises merely by inference. The court is not clothed with jurisdiction to allow discovery if the reference is merely to a transaction which on the balance of probabilities must have been effected by a document – see Slade LJ in the *Dubai Bank's* case. ...
>
> The exercise of the learned judge's discretion was obviously based on the wrong premise that the appellants admitted having the said documents in their possession, custody and power. There is not a shred of evidence adduced to support that.

[68] In *Nguang Chan* (*supra*), the Court of Appeal sharply reprimanded the High Court when it allowed the discovery application even though there was no allusion or evidence to possession, custody or power. The mention of 1,500 cartons of Chinese wine, which was a matter in dispute in that case, was mentioned in a letter of which the applicant based their application on. However, the Court of Appeal found that the affirmation by deponent merely reflects the deponent's understanding of the letter. The affirmation, however, did not show direct correlation to the existence of those 1,500 cartons. In the end, the Court of Appeal held that the application was unsupported by any evidence.

[69] Supported by *Nguang Chan* (*supra*) this court cannot allow a discovery application relying on something that a party may possess or have in custody or power. The application must be supported by evidence as the allusion of possession, custody or power of the party being sought against.

[70] To allow a discovery application on the basis of presumption is an exercise of futility – *Ong Commodities Pte Ltd v. Kek Tek Huat Sdn Bhd & Anor* [2015] 10 CLJ 585; [2016] 10 MLJ 344 at p. 595 (CLJ); p. 355 (MLJ):

> As such the plaintiff has failed to establish the primary requirement for the grant of a pre-action discovery order, i.e. that the plaintiff requires information and documents, which are in the possession, custody or control of the defendants. In the circumstance, it is obvious that the making of such an order would be an exercise in futility and would not serve any useful purpose.

[71] Similarly, this court cannot allow a discovery application on a fishing expedition. This court finds support in the judgment of *Nguang Chan* (*supra*) at para. 13:

> Finally the court would dismiss a plaintiff's application for discovery if it is of the view that the plaintiff was 'merely fishing for evidence to prop up his case' and to allow him discovery would be unduly oppressive to the party giving discovery – see *Leslie S Holmes v. Engineering Service Inc* [1993] 1 AMR 27 at p 36.

and in the decision of my learned brother Awg Armadajaya Awg Mahmud JC in the case of *Pangsapuri Anda Management & Ors v. Pembinaan Safilo Sdn Bhd* [2021] 1 LNS 175; [2021] MLJU 161 at paras. 28 and 29:

> Discovery or disclosure should be conducted on relevant documents only and with the intention to determine certain issues. There shall be no fishing expedition or discovery of unrelated documents. ...
>
> Thus, in seeking for discovery, the parties must ensure that documents listed in the List of Documents (Form 38 of the Rules of Courts 2012) are in the other parties' possession, custody or power and they are not privileged documents. These are the requirements for discovery process.

[72] The definition of "fishing" in *Re State of Norway's Application* (*supra*) is applicable in this context:

> It arises in cases where what is sought is not evidence as such, but information which may lead to a line of inquiry which would disclose evidence. It is the search for material in the hope of being able to raise allegations of fact, as opposed to the elicitation of evidence to support allegations of fact which have been raised *bona fide* with adequate particularisation.

[73] A thorough reading of Schedule A would show that through it, the plaintiff is asking wide range of items many of which the plaintiff cannot even specifically confirm the existence. Also, it is rather odd that the plaintiff tried to seek discovery against all four defendants in one application and in one schedule. The items are related to the defendants separately and in different circumstances. Hence, the discovery application should have been made against them individually in different grouping. The tactic of making a global application against all of them in one go is to this court an inference of trawling or ransacking fishing expedition. Also, it further negates the fulfilment of key element of "necessary".

[74] Besides, in justifying the discovery for most of the items in Schedule A, the plaintiff attempted to argue that if these items are not relevant, or are not within the custody, possession, or power of the defendants, it is for the defendants to prove to the court. This is misconceived. The court is mindful of the *ratio* of the case of *Kenwood Electronics (Malaysia) Sdn Bhd v. People's Audio Sdn Bhd & Ors* [2003] 5 CLJ 436; [2003] 5 MLJ 276, at pp. 446 to 447 (CLJ); p. 287 (MLJ):

> ... and order of court ... would have the effect of shifting the legal burden of proof, i.e. to prove conspiracy to defraud, from the plaintiff to the second, third and fourth defendants. It is trite that the legal burden of proof rests throughout on the plaintiff.

[75] The detailed discussion on each of the items sought under Schedule A and my observation and reasoning in refusing the discovery for such items are separately discussed below.

Items 1-5

[76] The plaintiff tried to seek these items to show the receipt and the disposal of all or part of the RM28,171,870. It is the plaintiff's submission that item 1, being the financial statements of the first defendant for the year ended on 31 December 2015 to 31 December 2018 would show how the first defendant dealt with the sum of RM28,171,870 paid on 30 July 2015.

[77] As for item 2 to 5, the plaintiff submitted that the monetary trail relates to the plaintiff's case that the forfeiture of RM28,171,870 was the result of a conspiracy to enable the defendants to keep this sum for themselves. As submitted by the plaintiff's counsel that this is based on the plaintiff's suspicion that the defendants executed this conspiracy. They then submitted that these documents are relevant and necessary for the fair disposal of this case. They further alleged that if the first and second defendants are able to satisfy this court that there is information in the financial records and the financial statements which involve third parties, with nothing to do with the sum of RM28,171,870, they may seek leave of this court to redact those parts of the information.

[78] With respect, this argument is flawed. This court cannot allow a discovery application on the basis of presumption. As decided in *Ong Commodities* case (*supra*), allowing a discovery application on the basis of presumption as it is an exercise of futility. Besides, the attempt to ask for these documents in such a wide spread and range of time, duration and a "catch-all" manner is nothing but, to this court, a fishing expedition. A safety net is thrown and placed here to catch as much information as possible. This goes against the requirement of "specific". Also, as mentioned by the defendants in their affidavits-in-reply, many of the documents are not within their custody, possession, or power. The financial records requested in items 1, 2, 3 and 5 of Schedule "A", for instant, are not within the custody, possession, or power of the third defendant. Likewise, the other documents too.

[79] To prove their case on conspiracy the burden lies on the plaintiff to prove. The plaintiff has not produced an iota of evidence to support the plaintiff's contention and justify the necessity of discovery of these documents at this juncture. This court agrees with the submission of third defendant that the request is premature. Unless and until the plaintiff proves its case and establishes liability against the defendants, the application for discovery of the financial records is premature and intrusive.

Item 6

[80] As regards item 6 of Schedule A, the telephone records sought may be categorised as follows:

(i) between the defendants;

A (ii) between the defendants and their own employees/agents/nominees; and

(iii) between the defendants' employees/agents/nominees themselves.

[81] The plaintiff alleged that these telephone records are sought so that a complete record of the communications between the defendants to the B exclusion of the plaintiff from the time the fourth defendant's services was terminated (14 December 2015) and the time the first defendant refused to confirm and honour the varied SPA (27 February 2016). It has been said by the plaintiff that they have some of these records in the form of mails. What it also means to this court is that the plaintiff has no idea if these records ever C exists or ever within the custody, possession, or power of the defendants.

[82] When the first and second defendants submitted that they do not have records of past telephone conversations, the plaintiff rebutted it with the argument that this does not mean their employees/agents/nominees do not have them and that the first and second defendants may still be compelled D to produce such records in the hands of their employees/agents/nominees. This is obviously going against the requirements of "specific" and the need for the items to be within the custody, possession or power of the persons against whom the items are sought.

[83] It is misconceiving for the plaintiff to submit that because they are E asking these items during a specific time frame, that they are indeed specific in nature. The requirement of "specific" in this situation should be as such that the parties can instantly pinpoint to a particular conversation and respond to it. This not the case here. How then could this be specific?

[84] The plaintiff also submitted that "the number of calls and the persons F participated in those calls during that specific time frame would at the very least shine a light on the co-ordination between the defendants and may lead to a train of inquiry". This again casts doubt as to the relevancy and necessity of this group of items. Also, this is obviously a fishing expedition which this court should not condone.

G **[85]** Just as in the situation in many other items under Schedule A, where the items have nothing do to with one or more of the defendant(s) and thus, they are not within the custody, possession or power of that/those defendant(s). The records sought under item 6 here have nothing to do with the third defendant. Thus, they are not within the custody, possession, or H power of the third defendant.

Item 7

[86] In justifying their application for these items, the plaintiff submitted that "it is likely that earlier communications took place before the I correspondence was issued". This by itself has confirmed the submission by the defendants that this is indeed an attempt of "fishing expedition".

[87] Also, I agree with the submission by the solicitors for first and second defendants that what transpired between the first and second defendants and the first defendant's solicitors regarding the letter dated 18 April 2016 from Messrs Chew Biman & Co are privileged under s. 126 of the Evidence Act 1950. Besides, the contents of the letter dated 18 April 2016 only confirms what happened at the meeting held on 28 January 2016 where, at all times, the first defendant's solicitor took the position that the fourth defendant was still the plaintiff's solicitor as no other solicitor was appointed to take over the matter from the fourth defendant. Thus, the documents requested for in item no. 7 of Schedule A from the agents and/or employees of the first and second defendants are irrelevant as the contents of the letter dated 18 April 2016 only relates to Nicholas Chang's version of events as to what happened at the meeting held on 28 January 2016.

[88] The plaintiff has not stated the relevance of this letter anywhere in their pleadings and this clearly shows that the plaintiff is going on a fishing expedition whereby the plaintiff is requesting for documents randomly from the first and second defendants' agents and/or employees. The names of the alleged "agents and/or employees" are also not mentioned. These requests are prolix and oppressive in nature.

[89] I also agree with the submission by the fourth defendant that the items are related to the bills issued. Hence, it has no relevancy or necessity to the plaintiff's case.

Items 8 And 9

[90] Items 8 and 9 relate to two letters issued by the third defendant on the plaintiff's letterhead. These letters were produced by the third defendant in the course of exchanging documents. Here, the plaintiff sought for discovery of any communications between the defendants which led to the issuance of these letters, which the plaintiff's principal, Felix Wong, did not authorise. Again, these items are not specific.

[91] The plaintiff in their submission also asked the question, "were there minutes or memoranda of the meeting?" and further submitted that, "if so, they should be produced to form a complete record of the communications between the parties relating to the issuance of these letters". Again, these are all presumption, and this court cannot allow a discovery application relying on something that a party may possess or have in custody or power. The decision in *Nguang Chan* case (*supra*) is clear to us that a discovery application must be supported by evidence as the allusion of possession, custody or power of the party being sought against. The plaintiff has blatantly failed to do so here.

[92] Besides, as submitted by first and second defendants that the letters dated 24 October 2015 and 27 October 2015 are the plaintiff's letters and are not the subject matter of the plaintiff's pleaded case. As a director of the

plaintiff at that time, it is also an undisputed fact that the third defendant has the authority to write these letters on behalf of the plaintiff. The plaintiff should know the reason for issuance of their own letters to the first defendant. These letters were all copied to Felix Wong. In the event the plaintiff disputed the contents of these letter, then the plaintiff ought to have disputed the contents in 2016. The contents of these letters reflect the conversation of the meeting held on 28 January 2016 between the second defendant, third defendant and Felix Wong with the attendance of the fourth defendant and the plaintiff's letters also reflects that the 8% rebate will be given to the plaintiff if the balance purchase price is paid by 20 December 2015. The issue of this 8% rebate is also not the plaintiff's pleaded case. The plaintiff till to date has not disputed the contents of these letters especially since the plaintiff would benefit from the 8% rebate. Therefore, the 8% rebate is a non-issue! How then would this be relevant and necessity to this trial?

[93] On this issue, the communication requested by the plaintiff in items 8 and 9 in Schedule A with regard to the plaintiff's own letters are irrelevant because as stated by the first and second defendants, no communication existed between the first and second defendants' agents and/or employees including Nicholas Chang and Felicia Ng because the letters were only the plaintiff stating the facts of what was discussed in the meeting held on 20 December 2015.

[94] Further, these are internal matters of the plaintiff. Obviously, the first and second defendants have no knowledge or control. Thus, these items are not within the custody, possession or power of the first, second and fourth defendants.

[95] I also agree with the third defendant's submission that:

(i) by the plaintiff's own acknowledgment, the said letters were issued on the plaintiff's letterhead;

(ii) as such, these letters have been falsely and erroneously characterised by the plaintiff, as communications between the defendants; and

(iii) in any event, the third defendant has given evidence that the said letters are the complete record of the communications of the matters therein.

[96] I further find merit in the third defendant's submission that since the communications requested in items 8 and 9 are not within the custody, possession, or power of the third defendant, the discovery for the same should fail.

[97] Again, the discovery for these items therefore must fail because it has not fulfilled the essential requirements mentioned earlier. The generic nature of these items further supports the contention that the purpose here is to ransack aimlessly.

Item 10

[98] The first and second defendants brought it to the court's attention that the email dated 17 December 2015 by Felicia Ng is within the full knowledge of Felix Wong. This email is also not relating to the subject matter of the plaintiff's pleaded case. By this email, the second defendant is merely assisting the plaintiff to solve the issue between the fourth defendant and the plaintiff with regard to the fourth defendant's legal fees in respect of the SPA in order for the sale of the Ampang land to be completed. This is because all the transfer documents relating to the SPA is in the possession of the fourth defendant and the plaintiff had issues with the fourth defendant and had not appointed a new solicitor to take over and handle the matters relating to the SPA. Further, the contents of this letter were for the plaintiff's benefit where the fourth defendant was required to forward the original document of title to the plaintiff once payment of balance purchase price had been paid. Besides, the fourth defendant never agreed to the proposal made by the first defendant and did not respond to said email.

[99] Thus, it is obvious to us that again, the request for such a generic item here is nothing but a fishing expedition without any necessity to our present case.

Item 11

[100] This court agrees with the submission by defendants that item 11 has no relevancy and necessity to this case. The contents of Nicholas Chang's email to the fourth defendant dated 5 January 2016 was also in regard to the plaintiff and first defendant's agreement for the payment of the fourth defendant's legal fees in order for the SPA to be concluded. The first defendant had assisted the plaintiff to complete the purchase of the Ampang land which includes contribution to pay to the payment of the fourth defendant's legal fees in the amount of RM500,000 from the balance purchase price paid by the plaintiff. The payment of RM1 million to the fourth defendant was discussed and agreed between the plaintiff and first defendant and this is clearly shown in the plaintiff's letter dated 1 February 2016 and plaintiff's email dated 26 February 2016 (encl. 35 – exh. "LSP-1") and this fact has also not been disputed by the plaintiff.

[101] Thus, the issue of discovery of documents as requested in items 10 and 11 of Schedule A is completely irrelevant to the plaintiff's pleaded case. This clearly shows that the plaintiff is going on a fishing expedition to request for documents that are not specific, and the documents requested for by the plaintiff are documents that are not certain. The plaintiff had also requested for documents to be produced from parties who are not parties to the present proceedings. Again, this court cannot allow the discovery of item 11 for it is obviously trawling, which this court should not be condoning.

Item 12

[102] The plaintiff by item 12 of Schedule A is seeking for all record of communications between the defendants to the exclusion of the plaintiff between 14 December 2015 and 27 February 2016. This is to be read together with item 6 of Schedule A.

[103] This court takes notice that as mentioned by the first and second defendants that all the relevant documents and emails between the plaintiff and the first and second defendants during this period has been forwarded to the plaintiff. Also, the third defendant has provided the plaintiff with WhatsApp messages which may be relevant to item 12 of Schedule A. Yet, the plaintiff without identifying any specific documents was generally requesting for discovery of documents without showing if such additional documents exist or are relevant and of necessity to the present case. The court will not allow such a wide-ranging discovery as its sole purpose is to fish for possible claims and defence. Discovery in these circumstances will be tantamount to being oppressive.

[104] Therefore, it is clear that the discovery action has failed the three-fold test in many aspects. Also, the generic nature without specific in certainty, identifying the exact item and, in some cases, without detailing them with the name of the parties involved, and the time and date have all tainted the application under encl. 32.

[105] Due to this conclusion, this court has denied and dismissed the discovery of all these items. Besides, it is my observation that this ransacking mission is tacitly done by laying the net as wide as possible, to obtain as much information as possible. In most cases the items sought are only due to the presumption of the plaintiff. Without clearly confirming that the items are in the possession, custody or control of the defendants, the discovery of those items would be an exercise in futility. The granting of a discovery order for these items would not in any way fulfil the purpose of fair disposal of the cause or saving costs. Instead, it would further prolong the matter unnecessarily.

Conclusion

[106] Thus, the plaintiff's applications for interrogatories (encl. 31) and discovery (encl. 32) and all other reliefs are clearly unsustainable. This court thus decided that both of the applications of the plaintiff be dismissed with costs of RM10,000 for both of the first and second defendants, RM10,000 for the third defendant and RM5,000 for the fourth defendant. All of the costs awarded are with allocator fees.